Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 85-1558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EMPIRE GAS, INC. OF ARDMORE,
Petitioner,

v.

VERNON HARDY AND LINDA GAIL COFFMAN,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner readily admits its failure to raise the issue of preemption of state law remedies as might be allowed pursuant to the Employee Retirement Income Security Act (ERISA). However, the obvious jurisdictional conflict presented does form the basis of an allowable exception as outlined in the original Petition presented in this case. The very nature of the jury verdicts returned in the present case, based upon the evidence presented and exhibits introduced at trial, directly or indirectly decide a federal question.

The verdict returned in the Vernon Hardy case read as follows:

(1) "Was the contract in question induced by fraud? Yes.
(2) Omitted in accordance with instructions.
(3) Did the Defendant wrongfully prevent the Plaintiff from securing employment? Yes. If the answer to question 3 is yes, list the amount of damages. $10,200.00
(4) Did the Defendant commit fraud? Yes. If the answer to this question is yes, list the amount of damages. $70,822.15.

Signed: Alva L. Hamric, Forman."

A similar verdict was returned as to Plaintiff Coffman at the trial of these cases. The complaints filed by both Plaintiffs in the cases alleged, among other things, two theories of recovery based on fraud. (Pet. 1a) Clearly, a verdict returned in this form awards punitive damages based on common law fraud for actions or activities of Respondents' pension plan.

Respondents argue that the misrepresentations found to have been made were made by their employer concerning matters having to do with their employment and a purported stock interest they held in common stock of the employer. If not adequately addressed by various exhibits introduced at trial; namely, the prospectus; certainly by direct and cross examination testimony of at least two witnesses concerning the matters about which misrepresentations were found to have been made concerned only that stock interest held by the Employee Stock Ownership Plan participated in by the Respondents. In fact, the evidence revealed that the value of Respondents' interest in the Plan more than doubled as a result of the merger. Petitioner calls attention to the elements of fraud recited by the Alabama Supreme Court in its opinion. (Pet. 3a) (There was no evidence introduced at trial as to any stock interest held by either Plaintiff individually in common stock of the employer.)

The same exhibits referred to above introduced at trial contain specific, legal representations and disclosures of the existence and qualification of the Employee Stock Ownership Plan being subject to the provisions of ERISA. As such, the disposition of plan assets is a matter strictly within the purview of the plan administrator as a matter of law, and any misrepresentations about which Respondents suffered could only have been a breach of duty by the plan administrator, and in no way a breach of duty by the employer. The great weight of evidence at trial was that full and adequate disclosure as required by law of activities affecting plan assets was made to all plan participants.

Respondents inaccurately rely on a number of cases in support of their argument that ERISA does not apply in the present case. For example, the case *Dependahl vs. Falstaff Brewing Corp.*, 653 F. 2d. 1208 (1981) was clearly an attempt by the Plaintiffs in that case to maintain an action to recover punitive damages based on a fact situation concerning a

qualified plan. Petitioner respectfully calls the Court's attention to pages 1215-1217 of the opinion as reported in that case. There the Court very articulately delimiates the purpose intended by Congress by the preemption provisons of ERISA.

Further, the verdicts in this case clearly circumvent §1001 (b) of the act, which states:

> "It . . . hereby declared to be the policy of this act to protect interstate commerce and the interest of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the federal courts." 29 USC §1001 (b) (1976)

As stated in *Dependahl, supra*, Congress clearly intended to "occupy the field" of employee benefit plans. Respondents claim that the type of fraud perpetrated on them in this case was "to tenuous, remote or peripheral...to warrant a finding that the law "relates to" the plan". *Shaw vs. Delta Airlines, Inc.*, 103 S. Ct. 2890, 2901 n.21 (1983) Petitioner respectfully suggests that Respondent's quotation here is strictly taken out of context, and that the thrust of *Shaw vs. Delta, supra*, was to, once again, clarify the intent of Congress with its passage of ERISA. The footnote quoted by Respondents in their brief is extremely ambiguous, and clearly has no bearing on the issues or facts presented in the present case.

Respondents repeatedly, and somewhat circularly, argue the untimeliness of Petitioner's assertion of the preemption provisions of ERISA. While this argument is well taken in most litigation, the facts of the present case clearly support an exception to that policy. The Supreme Court of Alabama has held that the failure of Plaintiff or trial court to add a necessary and indispensible party, and of Defendant to raise the absence

of such party in his or her pleadings, does not necessarily dispose of the issue; defect can be raised for the first time on appeal by the parties or by the Appellate court Ex Mero Motu. Further, absence of a necessary and indispensible party necessitates dismissal of cause without prejudice or a reversal with directions to allow the cause to stand over for amendment. *J.C. Jacobs Banking Co. vs. Campbell*, 406 So. 2nd. 854, 857. In that case the Court held that a necessary and indispensible party was absent from the litigation, but on application for rehearing, determined that the rights of that party were protected by another party that was present in the case. Petitioner contends here that any and all representations concerning the disposition of assets held by the Employee Stock Ownership Plan were strictly the responsibility of the plan administrator and that proper and adequate disclosure of same were made to Respondents.[1] The record as filed with the Supreme Court of Alabama contains a great deal of testimony and exhibits which clearly indicate that the subject pension plan was a qualified pension plan as defined by ERISA. ERISA not only preempts state law claims, including common law fraud claims, but establishes qualified plans as entities in and of themselves, subject to the jurisdiction of federal court. The only provision for concurring jurisdiction of state and federal courts concerning qualified plans has to do with the area of benefits, and matters relating to the integrity of plan assets is strictly reserved for federal court.

Once again, we find the Supreme Court of Alabama reserving the right to define the issues of a particular lawsuit based upon the preponderance of the evidence presented in the record. On review of the evidence in this case, the Alabama Court clearly committed error, if not based upon the pleadings, based upon the absence of a necessary party Defendant, assuming the alleged misrepresentations were not repudiated in writing, as originally set out in the petition.

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[1]Petitioner contends that the Alabama Supreme Court had judicial knowledge of ERISA and the authority to impute these issues, not necessarily just indemnify an absent indispensible or necessary party.

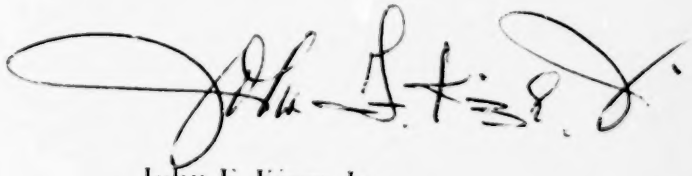
As with the *Hood* case (Pet. 6) the Alabama Supreme Court has recognized ERISA, its preemption provisions, and as shown by *J.C. Jacobs Banking Co., supra*, has further power to dispense with issues presented by the evidence.

CONCLUSION

Respondents' claim that the fraud verdict was based solely on the claim of fraudulent inducement of an employment contract is clearly erroneous from the face of the jury verdict form. Their further contention that there was no evidence of the qualification of the Employee Stock Ownership Plan pursuant to ERISA is also in direct contradiction to the record in this case.

For the reasons outlined in the original Petition to this and this reply to Respondents' Brief in Opposition, the Petition For Writ of Certiorari to the Supreme Court of Alabama is due to be granted.

Respectfully submitted,



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